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Nos. 88-902 and 88-929

In The

Supreme Court of the United States

October Term, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL, and the PYRAMID COMPANIES,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,

v. *Petitioners,*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., CALIFORNIA CHAMBER OF COMMERCE, AND THE CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE

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This motion of Pacific Legal Foundation (PLF), Resource Development Council for Alaska, Inc. (RDC), California Chamber of Commerce (CCC), and California Farm Bureau Federation (CFBF) to file the annexed amicus curiae brief is respectfully made pursuant to Supreme Court Rule 36.

Consent to the filing of this brief has been granted by all parties except for respondents, Sierra Club, *et al.* Copies of consent letters have been lodged with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has litigated numerous public interest cases which involve environmental issues in general and the interpretation of the Clean Water Act (CWA) in particular. PLF policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board authorizes active PLF involvement in a case only when there is broad community support. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

RDC is a nonprofit organization made up of thousands of Alaskans and Alaska business associations, labor unions, native regional and village corporations, and 26 local government units. All of these interests have come together to work for the responsible development of Alaska. RDC deals with a variety of issues that are

important to the economic prosperity of Alaska and recognizes that one of the most formidable roadblocks to development in Alaska is the federal government's land use policies and regulations. RDC has participated in numerous lawsuits and countless administrative hearings on land use and development in Alaska. RDC has a very distinctive perspective on the Environmental Protection Agency's (EPA) interpretation of 40 C.F.R. § 230.10(a) (1987), regarding the market entry theory for implementation of the practicable alternatives test. This theory was approved by the court below. In Alaska almost all of the land would be covered by only two market entry dates: (1) 1958, the year of statehood when the state government began selecting its 104 million acres from Alaska's total land area of 375 million acres, and (2) 1971, when Congress settled the long contested rights of Alaska Natives by granting them the right to select 44 million acres of federal land in Alaska. Prior to those dates the federal government owned over 99% of Alaska. RDC strongly believes the market entry theory, as interpreted by EPA, could end responsible development in Alaska inasmuch as over 70% of Alaska is wetland by EPA's definition. The lower appellate court's sanction of EPA's market entry theory will have a devastating impact on Alaska which RDC believes was never intended by Congress in passing the Clean Water Act.

The California Farm Bureau Federation is a volunteer, nongovernmental, nonprofit, California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county farm bureaus, with a combined membership at the close of its 1984 membership year of

approximately 98,000 farm families. Over 85% of all commercial farmers in the State of California are members of county farm bureaus. Members, many of whom farm and/or raise cattle throughout the United States and engage in wetlands agriculture will be negatively affected by EPA's market entry theory. The theory will reduce the acreage available for new crop production and will undoubtedly impinge upon the farm and ranch management decisions regarding what crops to plant, when to plant them, and where to plant them.

The California Chamber of Commerce is a broad-based, nonprofit organization through which business, industry, and agriculture join forces to work for positive action on key legislative, regulatory, and legal issues affecting California's economic and job climate. Chamber positions on issues are set by a board of directors, based on recommendations from statewide committees and task forces. Committee and task force members are volunteers with an interest or expertise in the subject. The chamber's members who are developers as well as the members who are farmers and ranchers will be negatively impacted by EPA's market entry theory. It establishes a standardless inquiry that virtually invites arbitrary and unequal application, and makes no sense in the real world of land use planning, financing, and development. If the market entry theory is not overturned by this Court, the chamber's members will be significantly and negatively impacted.

NEED FOR ADDITIONAL ARGUMENT

The Second Circuit Court of Appeals has rendered an interpretation of 40 C.F.R. § 230.10(a), implementing

Section 404 of the Clean Water Act, which not only fails to fulfill the statute's main purpose, but also severely and unnecessarily impacts development and agricultural interests nationwide. This interpretation called the market entry theory, has been discussed so far in an isolated, sterilized manner without a true indication of its potentially broad precedential impact. It is necessary for this Court to recognize how broad the impact of this decision may be in order to understand how it seriously conflicts with the purposes of the Clean Water Act. Unless the amici curiae applicants are permitted to file the annexed brief, it is unlikely that these critical precedential impacts will be brought to the attention of the Court.

For these forgoing reasons, Pacific Legal Foundation, RDC, CCC, and CFBF request that this motion to file the annexed amicus curiae brief be granted.

DATED: January 3, 1989.

Respectfully submitted,

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INTERESTS OF AMICI

The interests of amici curiae are set forth in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinion of the United States Court of Appeals is cited as *Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988).

STATEMENT OF THE CASE

John A. Bersani and the Pyramid Companies (Pyramid) began to search for a shopping center site in the Attleboro, Massachusetts, area in September, 1983. They found an undeveloped site owned by the Edward J. DeBartolo Corporation (DeBartolo), another shopping center developer, who had purchased the site in April, 1982. On the site are wetlands known as Sweedens Swamp. DeBartolo undertook to develop the site and had applied to the Massachusetts Department of Environmental Quality Engineering (DEQE) for a state wetlands permit, but it was denied in April, 1982. Pyramid acquired the site from DeBartolo in December, 1983, and proceeded to obtain all permits necessary to build except for the Section 404 dredge and fill permit. Although DEQE's permit standards were modified in April, 1983, Pyramid was able to obtain the state wetlands permit under the previous standards, apparently benefiting fortuitously from the fact that DeBartolo had initiated the state wetlands permit process prior to the changes.

When Pyramid sought its Section 404 permit it was faced with its last regulatory hurdle. It has found this hurdle virtually unscalable. The Army Corps of Engineers (Corps) applied the Section 404(b)(1) guidelines (40 C.F.R. § 230) and public interest review regulations (33 C.F.R. § 320.4 (1987)) and found the project met all requirements for a Section 404 permit. As part of the analysis the Corps had found that 40 C.F.R. § 230.10(a) was satisfied. This regulation, providing the critical issue in this case, forbids the Corps from issuing a permit if a "practicable alternative" *is* available to the applicant that "would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). The only other shopping mall site in Attleboro had been optioned by another mall developer (New England Development Company (NED)) on July 1, 1983, eliminating the last practicable alternative.

The Corps notified EPA on June 28, 1985, of its intentions to issue the permit. In response EPA determined that Pyramid had not complied with the practicable alternatives requirement of 40 C.F.R. § 230.10(a), and blocked the permit. It made this finding by inventing a new "market entry theory" for the regulation. Rather than considering practicable alternatives available at the time of the Section 404 permit was applied for, EPA changed this long-standing practice of the Corps and determined availability should be considered as of the time the applicant "entered the market." EPA then ruled that Pyramid must have entered the market before NED optioned the alternate mall site and therefore regardless of the wetlands mitigation measures agreed to by Pyramid, measures which would have created a significantly more

valuable wetland area, Pyramid was not entitled to its Section 404 permit. This litigation followed.

SUMMARY OF ARGUMENT

The purpose of Section 404 of the Clean Water Act which is to clean up the nation's water is circumvented by EPA's interpretation of 40 C.F.R. § 230.10(a). This regulation requires the Corps of Engineers to deny a Section 404 permit if practicable alternatives to a project exist which will have less impact on the aquatic ecosystem. EPA has created a market entry theory in analyzing whether "practicable alternatives" to the proposed project exist. This theory establishes an amorphous standard which is not only arbitrary and fails to further the goals of the Clean Water Act, but also severely impacts private property rights. None of these results were intended by Congress.

INTRODUCTION

This case involves an issue far more important than one developer trying to cope with one federal agency's overzealous, arbitrary enforcement of its regulations. Rather, it involves the fate of farmers, ranchers, miners, and developers throughout the nation who are being harmed by a federal agency and who will be injured even further if EPA's "market entry theory" for implementation of 40 C.F.R. § 230.10(a), as sanctioned by the Second Circuit, is allowed to stand. EPA has crossed a line drawn by Congress designed to balance the biological integrity

of a specific wetland area against productive development advantages that a site would provide. *See Bersani v. Robichaud*, 850 F.2d at 48 (Pratt, J., dissenting). Instead of focusing on effects of developing wetlands and significant mitigation measures which could be required of the developer to insure that on balance wetlands are preserved and maintained, EPA has focused on who is doing the developing. This focus is the unfair and arbitrary result of the market entry theory, whereby the particular land which is the subject of the Section 404 permit application is not examined but the party who wishes to develop the land is. The result has nothing to do with maintaining the biological integrity of the nation's waters and is completely contrary to the intent of the Clean Water Act.

ARGUMENT

I

THE MARKET ENTRY THEORY INTERPRETATION OF 40 C.F.R. § 230.10(a) CONFLICTS WITH SECTION 404 OF THE CLEAN WATER ACT

A. The Purpose of the Clean Water Act Is to Clean Up the Nation's Waters

"Section 404 of the Clean Water Act was enacted 'to restore and maintain the chemical, physical, and biological integrity of the nation's waters.' 33 U.S.C. § 1251(a) (1976) (Section entitled Congressional Declaration of Goals and Policy)." *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982), *cert denied*, 461 U.S. 927 (1983). *See also* 3 Legislative History of the Clean Water Act of

1977, 95th Cong., 2nd Sess. 532 (1978). This purpose in mind, it is clear that "EPA went wrong–seriously wrong–when it adopted the market entry theory to decide whether an alternate development site was available. By focusing on the decision making techniques and tactics of a particular developer instead of the actual alternatives to disturbing the wetland, EPA ignored the statute's (Clean Water Act) central purpose." *Bersani*, 850 F.2d at 48 (Pratt, J., dissenting). That purpose of course is to protect the biological integrity of the nation's waters and not to guard against decision making techniques and tactics of property owners.

B. Section 404 of the Clean Water Act Allows Discharge of Filled or Dredged Material into the Nation's Waters if There Is No Unacceptable Adverse Effect on the Environment

Section 404(a) of the Clean Water Act authorizes the Secretary of Army, acting through the Corps of Engineers, to issue permits for the discharge of dredged or fill materials. 33 U.S.C. § 1344(a) (1982). Section 404(b) provides that the Corps must base its decisions regarding permits on guidelines to be developed in concert between EPA and the Secretary of Army (meaning the Corps of Engineers). 33 U.S.C. § 1344(b). 40 C.F.R. § 230.10(a) is part of the Section 404(b)(1) guidelines and covers non-water dependent activities. These are activities that could be performed on nonwetlands sites just as successfully as on wetlands sites. This section reads, at Subsection (a):

> "Except as provided under Section 402(b)(2), no discharge of dredged or fill material shall be permitted if there *is* a practicable alternative to the proposed discharge which would have less adverse impact on

> the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." (Emphasis added.)

Subsection (a)(2) states that

> "an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered."

Subsection (a)(3) goes on to indicate that a site is to be presumed available if the activity proposed could occur on uplands just as well as it could on wetlands unless the applicant clearly demonstrates otherwise. The subsection also presumes that activities on upland sites have less adverse impact on the aquatic ecosystem unless it is also clearly demonstrated otherwise.

C. EPA's Finding of the Unacceptable Adverse Impact Is Not Supported by the Record

EPA of course engaged in a practicable alternatives analysis of the Attleboro Mall site pursuant to 40 C.F.R. § 230.10(a). EPA determined that a practicable alternative did exist and therefore it naturally followed that an unacceptable adverse effect on the environment, and in particular wildlife, per the criteria of 40 C.F.R. § 231.2(e) existed. Accordingly, EPA vetoed the 404 permit pursuant to its Section 404(c) veto authority. *See Bersani*, 850 F.2d at 40. EPA's articulation that its veto was due to an unacceptable risk on wildlife was clearly an attempt to

justify its veto by bringing it within the confines of its jurisdictional authority. However, the record discloses that the only basis for EPA's decision to deny the permit was "(1) the avoidability of the loss of wildlife habitat (meaning only that there was a practicable alternative), and (2) the significance of such areas in Massachusetts (meaning that the cumulative impact of this loss and losses at other unrelated wetland sites, far away from Sweedens Swamp, was an important factor in denying their permit)."[1] Robichaud's Petition for Writ of Certiorari at 6. Thus, by invoking the market entry theory to the practicable alternatives analysis of Section 230.10(a) EPA and the Second Circuit read out of the regulation not only its commonsense meaning but also eliminated other considerations to be evaluated during the permit process. First, they lost sight of the regulation's plain meaning that the Corps is to determine whether there *is* a practicable alternative, not whether there was or will be. Second they read out of the regulation its requirements to balance permit decisions on a number of environmental and

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[1] On the same date that Bersani filed his petition for writ of certiorari, Joe Robichaud and Citizens in Support of Attleboro Mall filed a similar petition of writ for certiorari. Robichaud argues that EPA has exceeded its Section 404(c) statutory authority when it vetoed the Attleboro Mall Section 404 fill permit on the basis of the cumulative loss of wetlands regionally or nationwide, rather than basing its decision on the environmental effects at the specific proposed site in question. Amici curiae fully support the position of petitioner, Robichaud, *et al.*, and adopts Robichaud's argument concerning the limits to which the EPA administrator can consider cumulative impacts when making a Section 404(c) veto.

other factors. 40 C.F.R. § 230; 33 C.F.R. § 320.4. Instead, as Judge Pratt stated: "[T]he market entry theory in effect taints a particular developer with respect to a particular site, while ignoring the crucial question of whether the site itself should be preserved." Instead of considering the significant environmental and economic and social benefits that would occur were the Pyramid partners able to go forward with Attleboro Mall, EPA established a brand new test for finding an unacceptable adverse impact.

D. EPA's Market Entry Theory Provides No Meaningful Standard

EPA established a new test for "practicable alternatives" which fails to provide any meaningful standard. The test may be that if, at any time during your ownership of a particular property or during the ownership of the property by your predecessor assuming some form of privity between you and that previous owner, there was some available, practicable alternative site to the one you now propose to develop, you categorically are not entitled to a Section 404 permit. Could this be the standard? Possibly, since the Court did say that since the North Attleboro site indisputably was "available when Pyramid's predecessor, DeBartolo, purchased Sweedens Swamp, one might argue, as EPA does, that Pyramid should be held to stand in its predecessor's shoes." *Bersani*, 850 F.2d at 41. But the court intimated as well that this may *not* be the standard. In trying to pin the standard down Pyramid asked a series of questions. Is the developer to seek alternative sites from the time of the first internal memorandum on a proposal to develop,

or when you first hire your land use consultant, or when you begin to negotiate for a particular site? *See Bersani*, 850 F.2d at 46. The court responded to those inquiries from *Pyramid* by stating "we are persuaded, however, that EPA is correct in asserting that it is unnecessary to pin down the standard to such a degree and that it would confuse things further to attempt to do so." *Bersani*, 850 F.2d at 46. To the contrary, what has been created is not an objective, fair standard, but an amorphous guideline under which no property owner's or developer can be certain as to whether or not he is complying with Section 230.10(a). Such a standard completely violates all precepts of fairness and property owners' due process rights. *See Morton v. Ruiz*, 415 U.S. 199 (1974).

E. The Market Entry Theory Fails to Protect the Nation's Water and Wetlands, and in Fact Ignores This Factor

The Second Circuit majority sees no problem in their market theory because it believes that the critical purpose of Section 404 is to provide an incentive to avoid developing in wetlands areas. The court reasoned that to choose some objective standard for delineating when the practicable alternatives test should be applied would not provide this incentive. But as the dissent aptly pointed out, Section 404 of the Clean Water Act is not a punitive section. It is not to provide an incentive to avoid choosing wetlands but rather the statute is directed towards maintaining the biological integrity of the nation's waters. To achieve this goal the statute calls for balancing the environmental and biological factors of the specific area against the economic, and social considerations of using

the site. *Bersani*, 850 F.2d at 40. With regard to the site at Sweedens Swamp, the area has been a degraded eyesore for years. As stated by petitioners, Robichaud, *et al.*, "Sweedens Swamp as it presently exists is a highly degraded, highly inefficient wetlands which fails to perform most of the ecological or recreational benefits which make wetlands worth preserving." Robichaud petition at 4. *Robichaud* carefully established the numerous benefits that would accrue to the environment as well as to the public at large were the project allowed to go forward. The petition cites at 4 the following:

> "In addition to extensive on-site mitigation, Pyramid informed the U.S. Army Corps of Engineers, the permitting authority, that it would construct over 35 acres of diverse, productive wetlands on an off-site parcel of land which presently is of very low ecological value. Thus, in addition to improving the wetland habitat which will be provided in the 26 acres of enhanced wetland which will remain after construction, Pyramid has agreed to create an *additional* 36 acres of wildlife habitation consisting of open water, marsh meadow, and shrub swamp.
>
> . . . .
>
> "The Corps found that Pyramid's off-site wetlands creation plans would result in a substantial improvement in overall wildlife habitat for the area. The Corps noted that Sweedens Swamp is a red maple swamp, a very common wildlife habitat in Massachusetts. By contrast the open water, marsh meadows and shrub swamp to be created by Pyramid is a relatively rare type of habitat in the Northeast. As a result, the off-site wetlands will attract animals whose presence in Massachusetts is limited severely by available habitat.
>
> "On balance, after exhaustively analyzing the degraded state of Sweedens Swamp and the millions

> of dollars of improvements to be made by Pyramid, both on-site and off-site, the Corps finally concluded that Pyramid's purported project would result in a net *benefit* to the environment by an order of magnitude of 1 1/2 to 1. The Corps found that Pyramid's proposal would result in a more efficient, functioning wetlands that would actually clean the water entering it, provide meaningful fisheries habitat, and provide for rarer and more endangered wildlife." (Emphasis in original.)

EPA's market entry theory, however, totally ignores this balancing analysis and gives no weight to water or wetlands protection. Instead a developer will be denied a permit on a specific site if a practicable alternative site was available at some time previous to his application for a Section 404 permit, a time undesignated by EPA, during which he had some inkling of developing that particular site or his predecessor had some inkling. But as Judge Pratt indicates, this theory does not protect the biological integrity of the waters, the swamp, or the land. Instead, this theory only punishes the present developer by denying him a Section 404 permit. Yet any future developer who has had no privity with the present developer, and was not looking for a site to develop at the time any practicable alternatives were available, could now develop the property under the market entry theory and obtain a Section 404 permit to do exactly what Pyramid proposed to do. This result is a distortion of the goals of the Clean Water Act. Clearly, what EPA has developed is not a means to promote water quality, but a scheme to stop development and growth. What will happen, of course, is that businesses which need to anticipate costs

to operate profitably won't be able to with the unpredictable standards of the market entry theory. As a consequence businesses may avoid an area like Attleboro and as a result, degraded eyesores like Sweedens Swamp, which provide no benefit and serve merely as breeding grounds for mosquitoes, won't be cleaned up, and wetlands enhancement and improvement won't occur. The Court must not allow such an unintended consequence to go unreviewed.

II

THE SECOND CIRCUIT'S DECISION SANCTIONING A STANDARDLESS MARKET ENTRY APPROACH TO THE IMPLEMENTATION OF 40 C.F.R. § 230.10(a) DESTROYS PROPERTY RIGHTS

Farmers, ranchers, miners, and developers, indeed all people who seek to put even their marginal wetlands property to productive use are jeopardized by the Second Circuit's *Bersani* decision. Even though states such as California, Oregon, and Washington have significant land masses which have been or could be classified by the Corps of Engineers and EPA, rightly or wrongly, as wetlands, the best classic example of this jeopardy can be found in Alaska.

Over 70% of Alaska is "wetland," by EPA's definition, even though the arctic gets less rain than California's Mojave Desert. In the arctic's brief summer the land is spotted with bogs because the snows of the preceding winter melt all at once and a subsurface permanent layer of ice covered permafrost prevents both drainage and absorption. Substantially all Alaskan land is owned by other than conventional private ownership. The federal

government still owns 60%; the state government owns or will own (after its selection process is complete) 28%; the native corporations will eventually own nearly 12% with the small residue in private ownership.

Thus, in Alaska, virtually any private or Native land sought to be developed has a very good chance of being characterized as wetlands. If EPA's interpretation and enforcement of its market entry theory is not overturned, there is an equally good chance that this same land will be met with a virtually insurmountable barrier to productive use, and once again Native land will bear the brunt of an antidevelopment ethic.

Despite the fact that Congress approved and ordered the transfer of 44 million acres to Alaskan Native corporations in settlement of their aboriginal rights, the Native use of land has repeatedly been stopped. For example, Shee Atika, Inc. (Shee Atika), an Alaska Native village corporation, selected 23,000 acres in the southwest portion of Admiralty Island. Environmental groups (Sierra Club, etc.) opposed any use of this land. In an effort to compromise, Shee Atika agreed to exchange its land on the southwest of the island for land on the northwest which was rated environmentally less sensitive by the United States Forest Service. Congress approved the exchange. Alaska National Interest Lands Act (ANILCA), Section 506(c), 94 Stat. 2371, 2409; history reviewed in *City of Angoon v. Hodel*, 803 F.2d 1016, 1018 n.1 (9th Cir.), *cert. denied*, 108 S. Ct. 197 (1984). But when Shee Atika applied for a Section 404 permit for a log transfer facility the legal battle began, eventually going twice to the Ninth Circuit.

The argument before the Ninth Circuit was that the practical alternatives the Corps of Engineers was required to consider prior to issuing any permit included *any land* Shee Atika could exchange its own land for! Even though all the land available for exchange was owned by the federal government and would have required congressional approval, the federal District Court considered that a "practical alternative." In reversing the District Court, the Ninth Circuit held that in selecting alternatives to the applicant's proposal the pertinent regulations require the Corps to consider the applicant's purpose and not just a broad generic public purpose. *Id.* at 1021; *see also* 33 C.F.R. § 230, Appendix B(11)(b)(5)(b). Holding that it was error to make a "broad social interest" the exclusive purpose and need, the Ninth Circuit stated that "when the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." *Id.* at 1021.

This decision, *City of Angoon v. Hodel*, is applicable to the facts in *Bersani* but is in direct conflict with the Second Circuit's *Bersani* decision. The *Angoon* case discourages soothsaying and "endless speculation." It also directs the permitting agency to apply the purpose of the statute to the project *as proposed* by the applicant. The court ruled that the scope of alternatives the applicant must consider need focus only on the safest, cleanest way to accomplish applicant's purpose which was to remove logs from Admiralty Island. *Id.* at 1021. On the other hand the *Bersani* case requires the Corps not only to investigate as viable alternatives any land available at the time of the permit application but also any land that was

available when either the applicant or his predecessor in title entered the market. Thus endless speculation is sanctioned. The case also sanctions eliminating from consideration development designs and wetland mitigation measures which promote the Section 404 goal of protecting the nation's waters by ignoring the project parameters of the Section 404 applicant.

In Alaska, the *Bersani* ruling may mean that all of Alaska must be considered an alternative site. If the State of Alaska needs to apply for a Section 404 permit, the state entered the market first in 1958 (when it was born as a state) and it could have chosen land in any area not specifically reserved by the federal government. The same argument would apply to Native corporations and the results would be the same. Development would *not* occur until alternatives back to the time of selection are evaluated and proven not to be practicable. And make no mistake about it, many special interest groups would seize upon this market entry theory and use it not to keep the nation's water clean, but to stop growth of any kind.

As a specific example, the market entry theory could be employed by opponents of placer mining. A placer miner works in the general vicinity of streams, and thus is usually working within wetlands areas. For the last few years the placer mining industry in Alaska has been defending a number of lawsuits to shut down placer mining. Armed with a new interpretation of 40 C.F.R. § 230.10(a), it takes very little imagination to think of the next legal attack on placer miners. The argument will be that when a miner began exploring (some have been at it for decades) there were thousands of acres of uplands where gold could have been and in fact has been found.

The miners' opponents will probably argue that uplands were, have been, and are practicable alternative mining sites to stream side sites and consequently, no Section 404 permits should issue per 40 C.F.R. § 230.10(a). Such a result, while it may seem attenuated and outlandish, is really no more so than the *Bersani* result, and may be even less so. In Alaska there are at least alternative sites. In *Bersani*, when the Section 404 application was made, there were no longer any alternative sites, yet Pyramid was denied its permit.

The extrapolation of *Bersani* need not stop here either. Consider the farmer who purchased a farm 30 years ago, part upland acreage and part wetland acreage. After years of letting the wetlands lie fallow, even if economics now require that he farm it, he will be told that he need not bother to seek a Section 404 permit. Why? Because there undoubtedly was upland farming land for sale and available when he bought his wetlands.

Obviously such a standard, which would then allow a new farmer to apply for the Section 404 permit if he purchased the original farmer's wetlands, is illogical and not within the contemplation of the Clean Water Act. Moreover, this interpretation of 40 C.F.R. § 230.10(a) defies common sense. As Judge Pratt recognized it "approaches a sensitive environmental problem through a time warp . . . ignores the statute's basic purpose, and . . . creates unfair and anomalous results." *Bersani*, 850 F.2d at 48. Congress would never have intended such a result and to attribute such intent to Congress is legal error which demands correction.

CONCLUSION

EPA's new market entry theory reinterpreting the practicable alternatives test of 40 C.F.R. § 230.10(a) doesn't make sense. In the context of this case the theory does not protect wetlands. Any new developer without a relationship to Pyramid will be entitled to a Section 404 permit for the Sweeden's Swamp site. In the context of achieving the Clean Water Act's goal of cleaning up the nation's waters, EPA's theory achieves no cleanup but rather substitutes a goal not of stopping wetlands damaging development, but of stopping a particular developer's development. In the context of the broad precedential effect that the Second Circuit's approval of EPA's theory will have, wetlands property owners everywhere will be faced with uncertainty and unpredictability as to what point in time they must show no practicable alternatives exist. Such unreasonable speculation will be required regardless of how much wetlands protection, enhancement, or even creation is agreed to by the property owner to ensure clean waters. Thus farmers, ranchers, miners and developers alike will not know what standard they must meet to obtain a Section 404 permit. This is clearly an unfair, amorphous, and arbitrary regulatory standard which will result in the destruction of private property rights.

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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